

# The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement

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*In this article, Professor Brown examines some distinctive problems presented by corporate crime enforcement that, on their face, seem troubling but that considered in context, he suggests, may actually have desirable effects. Professor Brown begins by noting that while most of constitutional criminal procedure addresses concerns of excessive governmental power, white-collar corporate offenders are less at risk. In contrast to street-crime defendants, they have ample access to counsel and a variety of means to resist government enforcement strategies. The article describes a range of practical barriers that make corporate crime harder to detect, investigate and prosecute and that, because of the wider range of regulatory possibilities (including civil enforcement), create opportunities for manipulation by corporate offenders. Professor Brown suggests, however, that these seeming difficulties actually provide a desirable counterbalance (albeit imperfectly and largely by coincidence) to a distinctive American preference for excessive use of criminal law to address wrongdoing and social harm. The article concludes that, while risks remain of both excessive government punitiveness on the one hand and excessive influence by corporate offenders to achieve undue leniency on the other, the practical barriers to corporate crime enforcement have the potential to moderate the government's pattern of populist-punitive enforcement in ways that could lead to improvements across the criminal justice enforcement spectrum.*

The practical limitations on investigation and adjudication of wrongdoing shape the substantive outcomes of criminal law, as well as its civil-regulatory counterparts. Enforcement officials must compromise ends—punishment and prevention of wrongdoing—to surmount barriers in the means to those ends. Punishment is not merely a function of criminal law's multiple (and sometimes conflicting) utilitarian, retributive, and virtue ethics goals, but also of the practical restrictions on implementing criminal law in service of those goals. Those constraints are, on the whole, greater in the white collar or corporate context (and in organized crime more generally) than for traditional street crime (especially crimes perpetrated by single actors or small groups). This paper explores the nature and extent of practical barriers to criminal law enforcement, and their distorting effects on the regulation of corporate wrongdoing.

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Practical barriers intersect with another important force distorting government regulation of corporate wrongdoing—the unique American preference for criminal enforcement and harsh punishment. The punitive turn in American criminal law over the last three decades is a much-discussed development.<sup>1</sup> It is most familiar in the street crime context, with the rise of a variety of mechanisms for imposing harsh sentences such as mandatory minimums, recidivist enhancements, restrictions on parole, and increased sanctions under the Federal Sentencing Guidelines. But the trend is much the same with regard to white collar and corporate crime, for which both bases for substantive liability and severity of punishment have increased, particularly in the last fifteen years.<sup>2</sup> America's

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<sup>1</sup> For three very different discussions among many more, see JAMES WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 3–67 (2003); DAVID GARLAND, *CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2002).

<sup>2</sup> The severity of punishment in white collar crime contexts has increased in three respects: new legislation that created new crimes or increased penalties; revised federal sentencing guidelines that increased penalties; and executive-branch enforcement policy that put greater emphasis on criminal law enforcement as a response to wrongdoing rather than civil remedies or other options.

For examples of statutes creating criminal liability in recent years, see Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1937 (2000) (creating offenses for fraud, false statements, embezzlement and obstruction in health care contexts); 17 U.S.C. § 506 (2000) (expanding criminal penalties for copyright infringement in 1982); 18 U.S.C. § 2319 (2000) (expanding criminal penalties for copyright infringement in 1992); No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (codified in various sections of 17 U.S.C. & 18 U.S.C.) (criminalizing copying of copyrighted works regardless of motive); Digital Millennium Copyright Act of 1998, 17 U.S.C. § 1201 (2000) (creating criminal penalties for sale or use of equipment designed to circumvent copyright protections); Economic Espionage Act of 1996, 18 U.S.C. §§ 1831–1832 (2000) (criminalizing economic espionage or trade secret misappropriation).

The Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2003), creates several new criminal provisions and increased penalties. Section 802(a) adds a new obstruction crime punishable by 20 years in prison that is codified at 18 U.S.C.A. § 1519 (West Supp. 2003) and also adds duties to preserve records, violations of which are punishable by 10 years in prison, codified at 18 U.S.C.A. § 1520(a) (West Supp. 2003). Another provision, 18 U.S.C.A. § 1348 (West Supp. 2003), mimics mail and wire fraud statutes to create a new financial fraud crime. 18 U.S.C.A. § 1350 (West Supp. 2003) creates lengthy prison terms for top officers who falsely certify firms' financial reporting.

For indications of increased executive branch commitment to pursuing criminal sanctions, see Status Report: Criminal Fines (Feb. 1, 2002), at [www.usdoj.gov/atr/public/criminal/9937.htm](http://www.usdoj.gov/atr/public/criminal/9937.htm) (reporting increases in criminal sanctions won by the Antitrust Division of the Justice Department); Office of the Attorney General, Bluesheet Revision to the U.S. Attorney's Manual on Environmental Crimes (Aug. 23, 1994), at [http://www.usdoj.gov/ag/readingroom/usam\\_env.htm](http://www.usdoj.gov/ag/readingroom/usam_env.htm) (authorizing greater federal prosecution of environmental crimes of "national interest"); Annual Report on Enforcement and Compliance Assurance Accomplishments (July 1, 2000), at <http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy99accomplishment.pdf> (describing increases in EPA criminal referrals to DOJ in the 1990s); Exec. Order 13271, 67 Fed. Reg. 46, 091 (July 9, 2002), available at <http://www.usdoj.gov/dag/cff/> (creating the Corporate Fraud Task Force).

For additional evidence regarding increased criminal penalties in the corporate crime context, see U.S. SENTENCING GUIDELINES MANUAL, ch. 8 (2003) (guidelines for Sentencing of Organizations, enacted in 1991). The Sarbanes-Oxley Act of 2002, *supra*, required the U.S. Sentencing Commission

uniquely punitive approach to confronting wrongdoing combines with strains of populism to pressure white-collar criminal law policy in the same direction as street-crime enforcement policy.<sup>3</sup> Yet the effects of that populist-punitive pressure on enforcement practice and outcomes are different in the corporate context than in the context of traditional street crime.

With regard to traditional street crime, we have a defined set of debates about the efficacy of criminal law as a crime prevention tool. Are harsh sentences necessary for deterrence, or could the same or better results be achieved with lesser sanctions and alternative strategies, such as drug treatment or work-release confinement? Even with those questions unanswered, prosecution is conceptually easy in retributive terms. In street crimes, intentional, wrongful conduct is usually easy to identify. There is little ambiguity about whether to punish an individual actor<sup>4</sup> or the larger entity in which he acts; unlike in corporate settings, street crimes usually involve no such larger entity. Of course, there are longstanding debates over the causative effects of environmental pressures or social contexts on offender behavior, but there is no entity to hold responsible for those pressures, nor one on which to impose liability as an incentive to ameliorate them.

As a practical matter, too, the prosecution of street crimes is comparatively easy. Investigation of street crimes has its practical challenges when witnesses or physical evidence are scarce, but it is usually straightforward. Searches of individuals and crime scenes are easier to execute than review of corporate records; confessions can often come easily; the scope of most street crime is narrow enough that investigatory efforts are manageable. As a result, we have an *individually focused* criminal liability for street crimes. The important debates about street crime enforcement and sentencing policy are mostly interdisciplinary; they address whether criminal law should be a smaller or larger part of the mix of strategies to prevent and redress wrongdoing. Though we almost surely have a far from optimal policy mix for crime prevention purposes, debates about punishment levels continue, compelled in various ways by American culture and politics. But

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to review organizational sentencing guidelines with an eye toward increasing penalties. See provisions codified at 18 U.S.C.A. §§ 1341, 1343 (West Supp. 2003) (increasing mail and wire fraud penalties from 5 to 20 years); 15 U.S.C.A. § 78ff(a) (West Supp. 2003) (increasing penalties for Exchange Act violations).

<sup>3</sup> For an argument on the greater populist input on American crime policy relative to European countries, see ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 61–96 (2001); cf. MARK J. ROE, *STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE* (1994) (arguing that populist forces shaped the law and structure of corporate governance and finance).

<sup>4</sup> This somewhat overstates the case. If the state possesses sufficient evidence, there is usually little ambiguity about whether conduct occurred that violates a criminal prohibition. But there can be room for disagreement about whether such conduct should be punished. Consider domestic violence cases, in which the evidence of a battery is often clear, but prosecutors (unless they have adopted mandatory-prosecution policies) may decline to charge upon the victim's request. More generally, some crimes go unprosecuted when other, non-criminal dispositions appear satisfactory, such as drug treatment for drug offenders or restitution and apology in some cases of theft.

the terms of debate and the range of available and considered options are narrower than in the corporate crime context.

In contrast, these twin factors of practical investigation and punitive preferences yield greater complications for corporate crime policy. White-collar wrongdoing poses far greater barriers to government investigation and information gathering efforts. And the American preference for punitive approaches to addressing wrongdoing generates difficulties because corporate wrongdoing presents a greater set of punitive options. Specifically, we have choices among multiple forms of criminal liability—individual and entity liability—in addition to well-developed civil alternatives for both individuals and entities.

The punitive enforcement approach developed in street crime drives enforcement practice in the corporate realm as well.<sup>5</sup> We want to see individuals, as well as firms, punished when crimes occur in corporate contexts because they often fulfill all the criteria for which street offenders are punished. They demonstrate intentional, wrongful conduct that causes great harm, often for no purpose greater than self-interest.<sup>6</sup> Once we commit to a vision of criminal law that mandates harsh punishment, as well as to a preference for criminal law over other preventive and remedial strategies, our cultural and policy consensus drives corporate as well as street crime enforcement policy. These dynamics can open up charges of hypocrisy if harsh punishments are applied only to street crime. More subtly, they constrain the parameters of what options beyond criminal law seem plausible and appropriate for addressing wrongdoing.<sup>7</sup>

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<sup>5</sup> For an argument that criminal prosecution in white collar contexts has increased and grown more harsh, see WHITMAN, *supra* note 1, at 43–44, 49, 55–56, and Mary B. Neumayr, *An Examination of the Criminalization of Commercial Activity* (July 25, 2002) (unpublished manuscript), available at <http://www.fed-soc.org/pdf/CrimFinal.pdf>.

<sup>6</sup> See WHITMAN, *supra* note 1, at 49 (“Just as we have been drawn to the proposition that all persons, even minors and business people, should be equally subject to exactly the same criminal liability, so we have been drawn to the proposition that all persons, once convicted, should be subjected to exactly the same penalty.”).

<sup>7</sup> For a version of that popular argument contrasting street and corporate crime punishments, consider Kurt Eichenwald, *White-Collar Defense Stance: The Criminal-less Crime*, N.Y. TIMES, Mar. 3, 2002, § 4:

In 1985, E. F. Hutton pleaded guilty to 2,000 felonies, admitting that it engaged in a huge check-kiting scheme; the firm paid \$2 million in fines and no one went to jail. In 1994, the psychiatric hospital subsidiary of National Medical Enterprises pleaded guilty to paying bribes and kickbacks to doctors; it paid about \$375 million and again, no senior officer saw a prison cell. That same year, Prudential Securities admitted committing widespread fraud in the sale of \$1.4 billion in investments to 120,000 people; this time, \$330 million in fines, no jail for anyone. And in 2000, Columbia/HCA Healthcare pleaded guilty to defrauding government health programs through an array of schemes; again, fines for the company, no jail for senior officers. . . .

How is it that someone is more likely to go to jail for robbing a liquor store than for defrauding the equivalent of the population of a mid-sized city? The answer goes to the nature of business fraud and the demanding standards of

The punitive impulse for corporate wrongdoing is complicated, however, when the wrongdoing is not clearly an explicit corporate policy, but instead is the product of intentional wrongdoing by individuals within a firm responding to a range of incentives and pressures, often market-based, for corporate financial performance.<sup>8</sup> We want intentional wrongdoers punished criminally, but we often lack evidence of *corporate* intentionality, corporate “ethos” for wrongdoing, or a comparable basis to identify entity blameworthiness.<sup>9</sup> When a basis for ascribing corporate responsibility is disputable (and often when it is not), instrumental incentives for some form of liability remain, but corporate *criminal* liability seems less compelling. It becomes easier to forego corporate criminal liability for other enforcement options, such as criminal punishment of individuals or civil remedies against firms. This conceptual barrier to corporate criminal liability joins with the hurdle of investigation costs to complicate the choice of policy responses in corporate settings where we have a range of strategies, such as enterprise liability, that give us more options for addressing the social structures and contextual pressures that make crime more likely.

I want to suggest that the practical hurdles to criminal enforcement, particularly against corporate entities, provide, imperfectly and largely by coincidence, a desirable counterbalance to the unique American preference for excessive use of criminal law to address wrongdoing and social harm. This thesis differs with critics who suggest that actual white-collar criminal enforcement is excessive—a view that often conflates potential criminal liability with actual practice. It also differs with those who criticize corporate criminal enforcement as too lenient—a view often built on the assumption that wrongdoing in corporate contexts should be addressed with harsh criminal sanctions to the excessive degree that we now use in non-corporate, street-crime settings.

This is not to say, in the least, that corporate criminal enforcement practice is perfect. Part of the problem, as I discuss below, is that we have no established sets of ideas, much less a consensus, on what an ideal enforcement regime would look

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evidence in the criminal justice system. It is not enough to prove there are victims, or that some people got rich from others’ suffering. Rules of evidence require the proof of several elements of the crime—some of which can look a lot like standard industry practice.

*Id.* at 3.

<sup>8</sup> For a survey of corporate employees finding that employees think illegality is widespread and due to company pressure, see KPMG 2000 Organizational Integrity Survey: A Summary (2001), at [http://www.hwlc.ac.uk/links/tlc/testweb/business/IMSrvy\\_.pdf](http://www.hwlc.ac.uk/links/tlc/testweb/business/IMSrvy_.pdf) (reporting that three-quarters of all employees witnessed illegal or unethical conduct on the job in the past year, half saw “serious” misconduct, and most said it occurred due to pressure to meet unrealistic schedules or earnings goals); see also William S. Laufer, *Corporate Prosecution, Cooperation and the Trading of Favors*, 87 IOWA L. REV. 643, 653 (2002) (discussing the impact of market pressures on corporate wrongdoing).

<sup>9</sup> See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991) (describing existing doctrinal bases for corporate liability and scholarly criticisms, and arguing for an alternative basis of proof of corporate “ethos”).

like. There remain substantial risks to the effective use of the criminal law stemming from the impact of practical barriers and populist over-enforcement, including firms' ability to displace liability from the entity to employees. But these risks are more ambiguous and difficult to assess than much of the current literature suggests. And corporate crime in practice is an unusual subset of criminal justice; litigants are often well matched against the government and can use their resources to negotiate for dispositions that moderate the populist pressure for excessive criminal punishment, that minimize the diffuse social costs and harms to third parties of criminal punishment, and that involve more creative mixes of civil and criminal sanctions and remedies than we see in traditional criminal enforcement practice.

Part I of this article maps many of the practical enforcement barriers that make corporate crime harder to detect and investigate and that create opportunities for manipulation by firms of the policy choices in corporate crime enforcement. It surveys the wide array of doctrines and policies, including the now pervasive strategy of extracting cooperation from offenders, designed to overcome these barriers and notes their limitations. Part II briefly surveys the conceptual difficulties of corporate crime enforcement, describing the range of possible civil and criminal strategies (and combination of strategies) and the competing rationales for choices among them. The final Part integrates these two discussions and evaluates the risk that firms can use their litigation resources (which often match the government's, a fact that is true for very few other criminal offenders), the government's pressure for cooperation, and structural barriers to investigation, as means to push enforcement toward options they prefer. While risks remain of both excessive government punitiveness and excessive influence by offenders to achieve undue leniency, I conclude that firms are often able to mediate the government's pattern of populist-punitive enforcement in ways that could lead to improvements for enforcement policy across the full range of criminal justice enforcement.

## I. PRACTICAL CHALLENGES IN RESPONSES TO CORPORATE WRONGDOING

### *A. Practical Barriers to Information Access*

Corporate crime is hard to investigate and prosecute for two key reasons: it is done in greater privacy and it is often complicated. Corporate wrongdoing is less visible and harder to detect than most street crime. Offenders of all types aim to avoid detection, but even in the realm of traditional crimes, wealthier offenders generally can avoid detection more easily than can poorer offenders committing the same crimes. This is William Stuntz's point that money buys privacy, and the

law—including criminal procedure—protects and respects privacy.<sup>10</sup> So, for instance, college students and lawyers can buy and use drugs in private spaces like dorms, homes, and offices, while low-income offenders more often resort to street markets that are more easily policed. Wealthier solicitors of prostitutes use discrete escort services; poorer customers solicit street walkers.<sup>11</sup>

Corporate crime occurs overwhelmingly in private, with evidence hidden in private settings, which makes it exceedingly costly to detect. Many corporate crimes are in the nature of fraud: securities fraud,<sup>12</sup> health care fraud, and banking crimes; even environmental crimes may be covered up with falsified records.<sup>13</sup> These are activities that occur largely in corporate offices or otherwise on the offender's private property and are carried out by creating documents designed to mislead and hide deception. Those offices and documents are protected in part by their physical location; the Fourth Amendment limits the government's ability to inspect them at will. Some corporate information is easily searchable if necessary to enforce a regulatory inspection system; for this purpose (and others) the Court has privileged the government's "special needs" and largely exempted the searches from Fourth Amendment regulation.<sup>14</sup> But this search privilege does not open all corporate records to regulators at will. Many documents are also protected by legal privileges, especially attorney-client privilege. Finally, even if they were otherwise accessible, the volume as well as the complexity of such financial records, in many cases, makes them hard to search effectively. Companies often make broad assertions of privilege for large volumes of documents, supported only

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<sup>10</sup> See William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995) [hereinafter Stuntz, *Privacy's Problem*]; William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1999).

<sup>11</sup> See William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998).

<sup>12</sup> The whole point of corporate wrongdoing in cases such as Enron's is to make publicly available records—of a firm's income and debts, say—appear favorable, while keeping private the evidence of financial manipulations or other illegalities.

<sup>13</sup> See GENERAL ACCOUNTING OFFICE REPORT TO CONGRESSIONAL REQUESTERS, MARINE POLLUTION: PROGRESS MADE TO REDUCE MARINE POLLUTION BY CRUISE SHIPS BUT IMPORTANT ISSUES REMAIN 3, 10, 15, 22, 50–53 (Feb. 28, 2000) (documenting criminal and civil sanctions against cruise ship companies for illegal dumping and false records or statements to cover up dumping). In a recent, typical case, Carnival Cruise Lines pled guilty to charges of illegal dumping in international waters, which it attempted to cover up by falsifying records and making false statements to Coast Guard officials. See Michael Connor, *Carnival Admits Ocean Polluting*, REUTERS, Apr. 19, 2002, available at <http://www.sdnip.delhi.nic.in/resources/pollution/news/re-22-04-02-carnival.html>; Catherine Wilson, *Carnival Pleads Guilty in Ocean Dumping Case, to Pay \$18 Million*, ASSOCIATED PRESS, Apr. 20, 2002, available at <http://www.sunsentinal.com/business/local/sft-419carnival.story?coll=sfla%2Dbusiness%2Dheadlines>.

<sup>14</sup> See *New York v. Burger*, 482 U.S. 691, 691 (1987) (upholding statute allowing police to search records and premises without reasonable suspicion as necessary to the regulatory inspection system). The government has upheld similarly broad search powers in other "special needs" contexts. See *New Jersey v. T.L.O.*, 469 U.S. 325, 325 (1985) (school inspection); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (employee inspection).

by affidavits. That tactic forces judges into the time-consuming task of reviewing the documents in order to rule on the validity of privilege assertions.<sup>15</sup>

These advantages of privacy and complexity vary with firm size and wealth. Wrongdoing arising in large, public firms is likely to be much more complex than in smaller, privately held firms, making it more costly for the government to untangle.<sup>16</sup> And larger, wealthier firms have the resources to fight to keep their records private; they can afford legal assistance that matches or surpasses the government's, and they can devise policies to take full advantage of privacy protections—to make as much information as hard to discover as possible. Smaller firms, as a group, have fewer resources with which to optimize privacy, litigate, and otherwise raise the government's costs of enforcement. This may partly explain why most firms sentenced under the federal sentencing guidelines are small, closely held firms.<sup>17</sup>

These obstacles to enforcement run straight up against the government's limited enforcement budgets. All budgets are limited, and local prosecutors certainly face resource constraints in prosecuting heavy caseloads of routine street crime. But as a general matter, local prosecutors rarely have to forego prosecution of serious felonies because of resource constraints. They may plea bargain more generously than they would with more ample funding, and they may decline to pursue low-level offenses, but serious street crime offenses almost always face a plausible prosecution effort. More importantly, in the street crime context, prosecutors' financial constraints are typically more than matched by defense constraints. Not so in corporate crime. Large firms can match or exceed the government in legal resources, though again small firms often cannot.

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<sup>15</sup> See John Gibeaut, *Junior G-Men: Corporate Lawyers Worry that They're Doing the Government's Bidding While Doing Internal Investigations*, 89 A.B.A. J. 46, 51 (June 2003).

<sup>16</sup> See, e.g., Eichenwald, *supra* note 7, at 3 ("The history of punishment in corporate cases is not very good," said Stephen Meagher, an ex-federal prosecutor now representing corporate and government whistle-blowers. "These are complex schemes, and it's sometimes difficult to unwind them from an investigative standpoint and ultimately explain them to a jury.").

<sup>17</sup> In 2001, less than 10 percent of firms sentenced under the federal guidelines that showed "involvement or tolerance" of criminal activity had more than 200 employees; two-thirds had fewer than 50, or showed no involvement in crime. See U.S. SENTENCING COMM'N, SOURCEBOOK FOR FEDERAL SENTENCING STATISTICS 2001, tbl. 54, available at <http://www.ussc.gov/ANNRPT/2001/SBTOC01.htm> [hereinafter 2001 SENTENCING STATISTICS]. The Commission does not distinguish between firms with fewer than 10 employees and firms of any size with no involvement in employees' wrongdoing. Statistics for the years 1996–2000 show much the same pattern. See U.S. SENTENCING COMM'N, SOURCEBOOKS FOR FEDERAL SENTENCING STATISTICS (1996–2000), available at <http://www.ussc.gov/ANNRPT/>.

For discussions the vulnerability of small firms to prosecution compared to large firms, see Annie Geraghty, *Corporate Criminal Liability*, 39 AM. CRIM. L. REV. 327, 338, 338 n.73 (2002); Saul M. Pilchen, *Catching the Little Guy*, LEGAL TIMES, Oct. 21, 1996, at S37 (stating that small firms whose management tolerated criminality account for most corporations sentenced under the first five years of the organizational guidelines).



This makes the enforcement dynamic different for large-scale corporate crime. With ordinary crime, we worry about oppressive government power, which is one traditional justification for criminal procedure rules such as the jury right, the presumption of innocence, the high standard of proof, defendant's exemption from compelled testimony, and Fourth-Amendment search limitations. The concern of government oppression is much diminished in the corporate realm with respect to large firms. With large firms, the dynamic is reversed: government may well lack the resources to effectively investigate and litigate against its private opponent.

### *B. Approaches to Information Gathering*

To counter the additional barriers against prosecution of heightened privacy and complexity, the government has two broad sets of strategies that are especially important in the context of large-firm wrongdoing. First, change the rules to make information-gathering easier—that is, reduce the legal creation of corporate privacy. Second, gain voluntary cooperation in breaching privacy. With regard to complexity, the second strategy helps more than the first. Easier access to information makes untangling its complexity easier, but only a little; investigators still need expertise. Voluntary cooperation can provide that expertise as well as information access.

#### *1. Legal Limits on Corporate Privacy*

With the growth of criminal law as a primary means to address white-collar wrongdoing, legal institutions have innovated a range of strategies to counter the privacy advantages of corporate actors. Many of these strategies arise from the legislative and executive branches, but courts have aided the government in this effort by tailoring constitutional law to ease the task of investigating firms. While the Fourth Amendment provides partial protection to corporations<sup>18</sup>—and implicitly tends to favor privacy that wealth can often purchase—the Fifth Amendment Self-Incrimination Clause does not apply to firms and organizations at all.<sup>19</sup> In the late nineteenth century, as soon as firms grew to sizes, and engaged in the sorts of activities, that could cause lots of harm, Congress devised the first modern corporate crimes.<sup>20</sup> Almost immediately, the Supreme Court began

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<sup>18</sup> See *Dow Chemical Co. v. United States*, 476 U.S. 227, 237–38 (1986) (noting that corporations get less Fourth Amendment protection than individuals); *Donovan v. Dewey*, 452 U.S. 594, 598–99 (1981) (same).

<sup>19</sup> See *Braswell v. United States*, 487 U.S. 99, 115–17 (1988); *Hale v. Henkel*, 201 U.S. 43, 70 (1906) (holding that firms have no right against self-incrimination).

<sup>20</sup> The earliest federal statutes creating corporate liability include: the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.); the Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2000)); Bankruptcy Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed by Bankruptcy Reform Act of 1978,

revising Fourth and Fifth Amendment doctrine to make the enforcement of those criminal statutes feasible. One part of that doctrine is the denial of the Fifth Amendment privilege against self-incrimination to corporations, and a limited version of this privilege for people who serve as custodians of corporate records. The Court's rationale for that doctrine has always been explicitly practical: a Fifth Amendment privilege for firms would greatly hinder regulation of corporations.<sup>21</sup> Those reduced entitlements, together with the broad investigative powers of grand juries,<sup>22</sup> give the government means to counter corporate information control.

## 2. Encouraging Voluntary Cooperation

Even without a Fifth Amendment privilege and in spite of grand jury subpoenas for corporate documents and agent testimony, firms still have substantial abilities to hide information on wrongdoing. In response, a range of sub-constitutional policies have been developed to create strong incentives for corporate actors to waive privileges. (Here we have a clear parallel between corporate and street offenders. In early-stage interrogations with police, street offenders are encouraged to waive the self-incrimination privilege and counsel entitlement, often in exchange for unenforceable promises of leniency.) These strategies encourage or coerce cooperation rather than reduce privacy protections in a way that allows the government easier access to non-cooperative suspects.

Justice Department policy explicitly makes cooperation with government investigation a factor in charging discretion; firms seeking leniency in charging and settlement are expected to waive attorney-client and work-product privileges and to turn over findings of their own internal investigations.<sup>23</sup> Federal prosecutors

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11 U.S.C. §§ 101–1330 (2000)). For an account of the early history of corporate criminal liability, see Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L.Q. 393, 401–02 (1981) (citing eighteenth century English cases of corporate liability).

<sup>21</sup> See *Hale v. Henkel*, 201 U.S. 43, 70 (1906) (holding that firms have no Fifth Amendment self-incrimination protection because recognizing it “would practically nullify” the Sherman Antitrust Act). To reach the result in *Hale*, the Supreme Court needed to undo the broad, property-rights based protections of *Boyd v. United States*, 116 U.S. 616, 616 (1886). For a discussion of *Boyd*'s property-based conception of privacy and the Court's route to revising it, see Stuntz, *Privacy's Problem*, *supra* note 10, at 1030, 1052–53.

<sup>22</sup> Grand juries' investigative power is much less constrained than the Fourth Amendment's regulation of police investigation. No showing of reasonable suspicion is necessary for a grand jury to issue a subpoena for testimony or documents. See SARA SUN BEALE & WILLIAM C. BRYSON, *GRAND JURY LAW & PRACTICE* 6:09, 6:26–27 (1986); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 261 (1995).

<sup>23</sup> See Memorandum from Deputy Attorney General Larry Thompson, to Heads of Department Components, *Principles of Federal Prosecution of Business Organizations* (January 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) [hereinafter Thompson Memo] (memorandum from deputy attorney general to U.S. attorneys revising corporate prosecution policy). For arguments that traditional enforcement strategies prompt firms to withhold or manipulate information rather than cooperate, see NANCY FRANK & MICHAEL LOMBNESS, *CONTROLLING CORPORATE ILLEGALITY: THE REGULATORY JUSTICE SYSTEM* 53–55 (1988); John T. Scholz,

now commonly demand such privilege waivers and other voluntary disclosures after indictment as prerequisites for non-prosecution or lenient plea bargains.<sup>24</sup> The government may succeed in winning waivers early in an investigation, even when it possesses relatively little other evidence of wrongdoing.<sup>25</sup> At the urging of Congress, the United States Sentencing Commission has increased sentences for both individuals and firms in white-collar crimes,<sup>26</sup> making the value of cooperating with the government through information disclosure even greater; half of firms sentenced under the guidelines cooperate with investigators.<sup>27</sup> Corporate internal investigations can be complex and thorough endeavors that, when disclosed to the government, do much of prosecutors' work for them. One advantage the government can gain from such private investigations is the benefit of incriminating statements made by firm employees to private actors—corporate attorneys conducting such inquiries—who are not bound by constitutional rules guarding against self-incrimination.<sup>28</sup>

Other mechanisms aim to overcome firms' information monopoly as well by gaining the help of one or more individuals within an uncooperative firm. *Qui tam* and whistle-blower-protection statutes<sup>29</sup> encourage insiders to disclose fraudulent

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*Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness*, 85 AM. POL. SCI. REV. 115, 116 (1991) (discussing disadvantages of deterrence-based enforcement with regard to information access).

<sup>24</sup> See David N. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147 (2000) (noting prosecution demands for waiver even at the outset of investigations); Gibeaut, *supra* note 15, at 48–49. For a discussion of conflicts between the interests of firms and employees in this context, see Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 VAND. L. REV. 1 (1997); Johnny J. Frank, *How to Cooperate with the Prosecutor*, N.J.L.J., Feb. 6, 1995, at 24 (describing increasing cooperation between firms and prosecutors).

<sup>25</sup> See Zornow & Krakaur, *supra* note 24, at 148.

<sup>26</sup> The Sarbanes-Oxley Act of 2002 directed the U.S. Sentencing Commission to increase sentences for corporate fraud. See Pub. L. No. 107-204, 116 Stat. 745, available at [http://www.ussc.gov/AGENDAS/11\\_19\\_02/corporatefraud003.pdf](http://www.ussc.gov/AGENDAS/11_19_02/corporatefraud003.pdf). In 2001, the Commission implemented a set of white-collar changes known as the Economic Crimes Package. See U.S. Sentencing Commission, Amendments to the Sentencing Guidelines (May 10, 2001), available at <http://www.ussc.gov/agendas/4-23-98/scconf.pdf>.

<sup>27</sup> See 2001 SENTENCING STATISTICS, *supra* note 17, tbl. 54. Note that this figure does not even account for firms that completely avoided sentencing due to cooperation.

<sup>28</sup> See Joseph F. Coyne Jr. & Charles F. Barker, *Employees Rights and Duties During an Internal Investigation*, in INTERNAL CORPORATE INVESTIGATIONS 169, 173–74 (Brad Brian & Barry F. McNeil eds., 2003) (noting that Fifth Amendment self-incrimination right of employees does not apply to statements made in interviews with their private employers, except in contexts in which the employer is a regulated entity whose actions will be considered state action).

<sup>29</sup> See Civil False Claims Act, 31 U.S.C. §§ 3729–3733 (2000). The Sarbanes-Oxley Act added new protections for corporate whistle-blowers. See 73 U.S.C.A. § 1514(A) (West Supp. 2003) (*inter alia*, making retaliation against whistle-blowers punishable by 10 years imprisonment and requiring boards to establish procedures to hear whistle-blower complaints). Many states have similar protections. The Justice Department's Antitrust Division has a "Leniency Policy for Individuals" that

corporate activity. A wide range of disclosure requirements, from money laundering to SEC<sup>30</sup> and EPA requirements,<sup>31</sup> mandate disclosures of various sorts, and inspection authority for regulatory officials ease search burdens and improve discovery of crime.<sup>32</sup> The Sarbanes-Oxley Act forces professionals—lawyers in particular—to be monitors and whistle-blowers.<sup>33</sup> Further, regulatory regimes encourage self-reporting of offenses by promising leniency. Some of those regimes benefit from the information-forcing effects of a prisoner's dilemma: actors within firms (or one firm when several entities are at risk of similar liability) are faced with incentives to be the first to disclose and thereby reap rewards for self-reporting. The same is true of leniency or amnesty policies that encourage colluding firms to defect and cooperate with the government.<sup>34</sup>

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promises immunity from prosecution in exchange for being the first to alert the government of illegal antitrust activity. See U.S. Dep't of Justice, Leniency Policy for Individuals (1999), available at <http://www.usdoj.gov/atr/public/guidelines/0092.pdf>.

<sup>30</sup> See Securities Act of 1933, 15 U.S.C. § 77(a)-(bbb) (2000) (requiring public firms' disclosure of information useful to investors through registration of securities; disclosure enforced in part by private rights of action by investors); Securities Exchange Act of 1934, 15 U.S.C. § 78(a)-(mm) (2000) (creating Securities Exchange Commission to regulate securities markets and public firms and adding disclosure requirements).

<sup>31</sup> See, e.g., U.S. Environmental Protection Agency (EPA), Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (Dec. 22, 1995) (policy "encouraging regulated entities to voluntarily discover, and disclose and correct [environmental] violations" in exchange for reduced civil penalties and non-prosecution); Emergency Planning and Community Right-to-Know Act of 1986, §§ 301-330, 42 U.S.C. §§ 11,001-11,050 (2000) ("Toxic Release Inventory" provision at 42 U.S.C. § 11,023 requires facilities in certain industrial sectors to file annual disclosures of their releases of hundreds of specified toxic substances). For an argument on the efficacy of TRI and disclosure requirements generally as regulatory tools, see Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor To A New Paradigm?*, 89 GEO. L.J. 257, 260-63 (2001). Another information-forcing provision, albeit one that applies to federal agencies, is National Environmental Policy Act of 1969, § 102(2)(c), 42 U.S.C. § 4332(2)(C) (2000).

<sup>32</sup> For other examples of policies encouraging information disclosure in exchange for leniency, see Office of the Inspector General, Department of Health and Human Services, Voluntary Disclosure Program Guidelines, June 9, 1995 (incentives for firms to detect and prevent fraud); Antitrust Division Corporate Amnesty Policy, Antitrust Division of the Department of Justice, (revised Aug. 10, 1993) (creating incentives for firms to disclose violations before others do).

<sup>33</sup> See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, § 307 (codified at 15 U.S.C. § 7245) (requiring the Securities and Exchange Commission to issue rules requiring securities lawyers to report violations of securities laws by company agents up the chain of command in the firm). For SEC regulations on this point, see Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,680 (Dec. 2, 2002). For a comprehensive listing of SEC regulations in the wake of Sarbanes-Oxley, see *Sarbanes-Oxley SEC Rules & Regulations*, at [http://www.sarbanes-oxley.com/pcaob.php?level=1&pub\\_id=SEC-Rules](http://www.sarbanes-oxley.com/pcaob.php?level=1&pub_id=SEC-Rules). For criticism of those regulations and skepticism of the statute's efficacy, see Susan Koniak, *When the Hurly Burly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236 (2003).

<sup>34</sup> See U.S. Dep't of Justice, Corporate Leniency Policy (1993), available at <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm> (defining conditions pursuant to which the Antitrust Division will forgo criminal charges in exchange for disclosure and cooperation).

Those sound like a broad range of discovery and information-forcing tools to overcome the substantial hurdles of prosecuting complex, private conduct. Moreover, many of these strategies, while aimed at forcing disclosure, also ease somewhat the government's task of understanding complex transactions. *Qui tam* plaintiffs, antitrust participants, corporate lawyers and other whistle-blowers provide access to arcane evidence, to document claims, and also expertise to explain them. Other factors, of course, complicate the picture. Most obviously, a requirement backed by penalty for noncompliance—or even an incentive backed by a prospect of reward—hardly guarantees compliance. Offenders may assess the risk of penalty, discounted by prospects of detection, as sufficiently low to merit a gamble of noncompliance. That is especially true when substantial incentives of financial reward lead actors into illegal conduct in the first place.

After reducing privacy through Fifth Amendment and grand jury doctrine, most government investigation strategy for complex corporate crime depends on gaining cooperation, either by encouraging it or coercing it; the government usually needs insider-offenders to provide information against other offenders. The challenges firms pose to government investigation and discovery—greater privacy and greater complexity—amplify the government's need for insider assistance. The need for cooperation, and thus also the compromises it requires, is much greater in the corporate crime context, even in comparison to other organized crime contexts. When crime is perpetrated by organized groups, cooperation by some members is typically essential to prosecution.

Yet in the corporate setting, the entity is also a prospect for liability; that is not true for the mafia, a drug cartel or informal associations prosecuted as racketeering organizations. That prospect has several consequences. In addition to raising policy choices about when entities should face liability in addition to or in lieu of individuals, corporate liability changes the cooperation dynamic. The firm itself becomes a player among those seeking to deal with the government to its advantage, and it can cooperate in unique ways that are not options for individual offenders inside or outside of organizations. Firms can disclose information that reveals corporate and individual liability, and they can exchange the promise of compliance plans for leniency.<sup>35</sup> More subtly, firms can negotiate for specific forms of the corporate entity—certain subsidiaries, say—to accept liability.<sup>36</sup>

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<sup>35</sup> Compliance plans have significant influence on outcomes in corporate crime cases. Justice Department policy lists the presence of a firm's compliance plan as a basis for leniency or declination in charging, and the Federal Sentencing Guidelines favor firms with such plans. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (2003); 2001 SENTENCING STATISTICS, *supra* note 17, tbl. 54 (reporting that 97.8% of firms sentenced in 2001 lacked a compliance plan, that the remaining 2.2% had plans that were deemed ineffective, and that no firms were sentenced if they had effective compliance plans).

<sup>36</sup> See Kurt Eichenwald, *HCA to Pay \$95 Million in Fraud Case*, N.Y. TIMES, Dec. 15, 2000, at C1 (noting "[a]lthough the practices involve widespread criminal actions in HCA's hospital system, the guilty pleas will be formally entered by two inactive subsidiaries"). Many crimes that involve fraud on the government, such as HCA's Medicare fraud, disqualify the offender from future government contracting. Convicting a subsidiary rather than the main firm preserves the firm's

Whenever the government must gain the cooperation of some offenders to punish others, it has to give up something; it typically grants some form of leniency, whether it is a discount under the Federal Sentencing Guidelines, a reduction in charges, or immunity. Cooperation, then, comes at a cost to specific deterrence and retributive goals with respect to the cooperating offender.<sup>37</sup>

### *C. Remedial Challenges Given Information Barriers and Cooperation Dynamics*

#### **1. The Rationales**

This cooperation dynamic—the government’s need for it, some offenders’ multiple options for manipulating it—complicates corporate regulation. As the prospect of corporate criminal liability grows, firms use the government’s desire for cooperation to achieve favored outcomes. A common, and perhaps increasing, strategy is to cooperate with the government to build a criminal case against individual employees. That cooperation, and the ability to convict individual offenders, often yields relative leniency for the firm.<sup>38</sup>

In the abstract, there is nothing unusual or untoward in this dynamic. When an average defendant cooperates first and in exchange receives the greatest lenity, not only are the instrumental rationales for that transaction clear but, as Michael Simons has recently argued, there is a plausible normative defense for it in retributive terms as well.<sup>39</sup> The government may be able to get convictions and civil penalties against the most culpable executives in a firm, and then be content with non-criminal sanctions for the firm. Those may include civil penalties imposed by regulators, or even bankruptcy and civil liability to private parties. This may end up being the government’s outcome in the Enron case. It has already obtained a conviction of one executive and clearly is targeting other individual officers.<sup>40</sup> The firm is facing substantial liability to shareholders as well as bankruptcy. Similar outcomes are developing with recent wrongdoing among investment banks. The government has targeted individual bankers for criminal

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ability to do business with the government again, a crucial privilege for firms in such fields as health care and defense contracting.

<sup>37</sup> Cf. Michael A. Simons, *Retribution for Rats: Cooperation, Punishment and Atonement*, 56 VAND. L. REV. 1 (2003).

<sup>38</sup> For a critical appraisal of this practice, see Laufer, *supra* note 8, at 652–59.

<sup>39</sup> Simons, *supra* note 37.

<sup>40</sup> See Kurt Eichenwald, *Former Enron Treasurer Enters Guilty Plea*, N.Y. TIMES, Sept. 11, 2003, at C1. For primary documents such as indictments, civil complaints and orders on all aspects of the Enron case, including the firm’s bankruptcy, shareholder suits and pending charges against individual officers, see Findlaw’s Special Coverage: Enron webpage at <http://news.findlaw.com/legalnews/lit/enron/index.html>.

prosecution, but Goldman Sachs, for instance, agreed with the SEC to a \$3.8 million settlement for alleged regulatory violations.<sup>41</sup>

A particularly good example of this sort of creatively mixed, criminal-civil disposition is the outcome for the Merrill Lynch investment banking firm resulting from its assistance to Enron in fraudulent financial transactions. Merrill Lynch first agreed to an \$80 million civil settlement with the SEC that did not require admission of wrongdoing. It then reached a separate cooperation agreement with federal prosecutors that promised no prosecution of the firm. In exchange, the firm admitted responsibility for wrongdoing by some of its agents and agreed to cooperate (including waiving privilege claims to documents) with prosecutors who have indicted former Merrill Lynch executives. The firm also agreed with prosecutors to implement a compliance plan to prevent its executives from repeating such misconduct. On the latter point, the firm agreed to pay for what amounts to supervised probation; Merrill Lynch will pay an auditing firm to monitor its compliance on the government's behalf for 18 months.<sup>42</sup> With packages of sanctions such as these, which include criminal liability for individuals, *corporate* criminal liability can plausibly be viewed as unnecessary. That is a clear implication of the federal policy for prosecuting corporations.<sup>43</sup> In deciding whether to charge corporations, the Justice Department's "Principles of Federal Prosecution of Business Organizations" advises prosecutors to weigh, among other factors, "the corporation's remedial actions, including any efforts . . . to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies," as well as "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance" and "the adequacy of remedies such as civil or regulator enforcement actions."<sup>44</sup> This policy suggests that outcomes, such as Merrill Lynch's, are appropriate: cooperation, civil penalties and other payments by the firm, along with criminal liability for individual officers, can justify declining prosecution of the firm despite sufficient evidence for corporate criminal liability.

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<sup>41</sup> See Jonathan Fuerbringer, *Former Economist at Goldman is Indicted*, N.Y. TIMES, Sept. 5, 2003, at C3.

<sup>42</sup> See Letter of Agreement between Justice Department Enron Task Force and Merrill Lynch (Sept. 17, 2003), available at <http://news.findlaw.com/hdocs/docs/enron/merrill91703agr.pdf>. For a description of the SEC settlement with Merrill Lynch in Enron matters, see U.S. Securities and Exchange Commission, Litigation Release No. 18038 (March 17, 2003), available at <http://www.sec.gov/litigation/litreleases/lr18038.htm>.

Most documents on the Enron case are available through Findlaw's Special Coverage: Enron webpage at <http://news.findlaw.com/legalnews/lit/enron/index.html> (linking to the indictment in U.S. v. Bayly et al. of former Merrill Lynch executives; Justice Department's Enron Task Force cooperation agreement with Merrill Lynch; SEC settlement agreement with Merrill Lynch). For a short summary of the Merrill Lynch case in relation to Enron, see Kristen Hays, *Lawyer: Anderson Should Have Gotten Deal*, AP NEWS, Sept. 19, 2003, available at <http://www.dfw.com/ml/d/startelegram/news/state/6813417.htm>.

<sup>43</sup> See Thompson Memo, *supra* note 23.

<sup>44</sup> *Id.* § II.

## 2. The Concerns

The risk of these sorts of agreements with large corporate suspects—and the reason these transactions draw critics<sup>45</sup>—is the prospect of the corporate offender manipulating the process and having an unfair advantage. This occurs at least two ways. First, the firm controls much information that is hard or impossible for the government to obtain otherwise, so it drives what we might call an unfairly hard bargain.<sup>46</sup> The second, more troublesome concern is that the firm is able to manipulate liability by unfairly shifting blame and punishment from the firm and top management to mid-level employees, and it is able to negotiate for the least injurious form of corporate liability, often a civil settlement and perhaps one imposed on a corporate subsidiary rather than the main firm. One version of this concern implies that firms are able, in some sense, to fool the government: they mask the degree of their own culpability while fully revealing, or even exaggerating, the culpability of agents. A more plausible version of this concern is that the government is simply persuaded that public interests are served by the package of dispositions the government is able to achieve in such cases, but it is persuaded of this because the firm is able to assist in achieving liability for individuals and is thereby able to engineer a much more modest sanction for itself. Under either version, there remains the prospect that firms betray agents by obtaining incriminating statements and documents from them through private means unregulated by constitutional limitations on criminal investigations, and they may be able to convince the government that the agent is more of a rogue actor than in fact he is.<sup>47</sup>

The implication of these concerns is twofold. Corporate offenders are able to manipulate and even deceive the government by holding more cards—greater litigation resources, greater information control, and sufficient ability to mislead the government about the nature of conduct by mid-level employees, top officers, and the firm itself. The second underlying concern is one that gets little development in any aspect of criminal law literature—a concern with distributive justice. The implication of criticisms such as William Laufer's is that firms (and

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<sup>45</sup> See Laufer, *supra* note 8; William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285, 1286–87 (2000). See generally articles in the Corporate Crime Reporter at [www.corporatecrimereporter.com](http://www.corporatecrimereporter.com).

<sup>46</sup> Whether such a bargain is really unfair depends on whether we choose to judge it by some normative criteria other than a simple market model in which parties come to a mutual agreement. On such a view, there is nothing unfair about one side achieving advantageous terms in any bargain to which the other side accedes. One criticism of that model—the one implied in views that such bargains are improper—points to the parties' relative endowments. This "endowment effect," critics could argue, gives the firm too much advantage, and makes a bargain that would be fair on other normative grounds, such as just deserts, improbable.

<sup>47</sup> William Laufer has written extensively in this vein. See William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343 (1999); Laufer, *supra* note 8.



top officers individually) get less than they deserve while others—especially mid-level employees—get more than they deserve.<sup>48</sup> Those are *comparative* judgments of desert. The evidence of mid-level employees' wrongful actions may be rock solid, but the discomfort arises from them facing the full force of criminal sanction when the firm (or others, such as top management) is able to escape with less than it deserves—less even if we accept a discount fairly allotted to the firm and top officers as cooperators.<sup>49</sup>

These criticisms are hard to assess. In the wake of convictions against top management in a range of high-profile corporate scandals, it's clear that the government often is *not* overwhelmed by the largest corporate defendants and duped into imposing liability on only mid-level employees with manageable civil sanctions for the firm. Deals such as Merrill Lynch's—which included an array of significant civil sanctions for its role in Enron's misdeeds—appear to be fully plausible dispositions, though that assessment does not address the *distributive* concern that Merrill Lynch avoided criminal liability when smaller firms or individuals who committed comparable wrongdoing did not. Nor can we assess, without much more information than is available publicly, whether the firm and top officers who escaped indictment were substantially less culpable than the executives who face indictment.

On the other hand, these are anecdotes, or at least exceptional cases in terms of the size of the firms, the wrongdoing, and publicity about the wrongdoing. More reliable data confirm that most corporate prosecution is of smaller firms rather than large.<sup>50</sup> That may mean that large firms are often able to avoid criminal liability with alternative dispositions that are unfairly lenient in comparison to other, smaller firms.

### 3. The Dynamics of Public Versus Private Enforcement

Assessment of whether firms can and do inappropriately escape criminal liability is made more difficult because it is not clear that the fact that a firm such as Merrill Lynch escapes corporate *criminal* liability means it has gotten off more

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<sup>48</sup> At least they get more than they deserve *comparatively*. I do not read this literature as asserting that mid-level employees are *wrongly* convicted of crimes they did not in fact commit. Rather, the claim is that others—the firm and top individual officers—did not face liability when they in fact were eligible for it, and perhaps also that mid-level employees, while having no legal defense, have a better argument for discretionary leniency from prosecutors because they were pressured by top officers into activities or production quotas that made criminal violations necessary.

<sup>49</sup> The fairness of this cooperation discount can be contestable in some contexts, as when the employees fully cooperated with an internal investigation, but the top officials cooperate with the government on behalf of the firm.

<sup>50</sup> As noted earlier, data from the U.S. Sentencing Commission indicate that, in 2001, only a small percentage of firms sentenced under the federal guidelines that showed "involvement or tolerance" of criminal activity had more than 200 employees and most had fewer than 50 employees; statistics for the years 1996–2000 show much the same pattern. *See supra* note 17.

easily than it would with a criminal conviction. Vic Khanna has argued that firms do not oppose the creation of corporate criminal liability because its existence often offers them *advantages*.<sup>51</sup> When criminal liability in some form seems inevitable, top managers and board members may want the firm to incur the criminal liability rather than top managers, both out of obvious self-interest<sup>52</sup> and because the firm is likely to be a better risk-bearer—better able to spread costs—than an individual. Further, criminal liability penalties are often *less* than liability incurred in civil or—especially—private litigation.<sup>53</sup> In the wake of scandals like Enron, firms apparently were more comfortable with increased criminal penalties—the Sarbanes-Oxley Act—than repeal of the protections of Private Securities Litigation Reform Act of 1995 (PSLRA), which greatly limited civil liability exposure in private actions for securities fraud.<sup>54</sup> Moreover, recent studies suggest that private civil litigation is a more effective regulatory mechanism for financial markets than public law enforcement.<sup>55</sup> If those points are true, it is not clear that an overall prosecution strategy of criminal liability on individuals and civil liability for firms—or even one foregoing criminal liability altogether when civil liability is substantial—is a route yielding excessive leniency for the firm.

On the other hand, if civil liability is in the hands more of regulators than private parties, large firms are often well positioned for resistance on that front. The government often remains at a substantial disadvantage in civil and regulatory

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<sup>51</sup> See Vikramaditya S. Khanna, *A Political Economy Theory of Corporate Crime Legislation*, part VI.C–D, 54–61 (Apr. 2003) (unpublished paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=392121](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=392121).

<sup>52</sup> Michael Simons has argued that firms rarely cooperate in cases in which top managers face real risks of criminal liability until those managers are replaced by a new team that can act in the corporation's interest without concern for their individual liability. See Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship"*, 76 ST. JOHN'S L. REV. 979 (2002).

<sup>53</sup> For an example, see Eichenwald, *supra* note 36, at C1 (noting that criminal penalties amounted to only \$95 million of the total \$840 million in combined civil and criminal penalties that HCA agreed to pay).

<sup>54</sup> See Khanna, *supra* note 51. For the statement of a Congressman urging repeal of the Private Securities Litigation Reform Act of 1995, see *Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises: Second Hearing on the Enron Collapse*, 107th Cong. (Feb. 4, 2002) (opening statement of ranking Democratic member Paul E. Kanjorski), available at <http://financialservices.house.gov/media/pdf/020402ka.pdf>.

<sup>55</sup> See Rafael La Porta, Florencio Lopez De Silanes & Andrei Shleifer, *What Works in Securities Laws?* (July 16, 2003) (unpublished paper), available at [http://papers.ssrn.com/paper.taf?abstract\\_id=425880](http://papers.ssrn.com/paper.taf?abstract_id=425880) (finding "almost no evidence that public enforcement benefits stock markets, and strong evidence that laws facilitating private enforcement through disclosure and liability rules benefit stock markets."); cf. James D. Cox & Randall S. Thomas, *SEC Enforcement Actions for Financial Fraud and Private Litigation: An Empirical Inquiry*, Vanderbilt Law and Economics Research Paper No. 03-08, at 2 (May 23, 2003), available at <http://ssrn.com/abstract=429140> (finding, *inter alia*, that "private suits with parallel SEC actions settle for significantly more than private suits without such proceedings; SEC enforcement actions target significantly smaller companies than private actions alone; private cases with parallel SEC actions take substantially less time to settle than other private cases").

enforcement, despite its invasive tools of discovery. This is because of severe limitations on enforcement budgets. Agency budgets for monitoring and enforcement are often too limited for substantial monitoring and enforcement,<sup>56</sup> and industries lobby Congress concerning the budgets of agencies that regulate them.<sup>57</sup> The SEC is a well-known example of an agency that (until recent corporate scandals and responsive legislation last year) was under-funded to the point that it was able to review only a small percentage of filings—a principal means for monitoring compliance with securities laws—and was limited in its ability to bring enforcement actions.<sup>58</sup> This has two effects that work against crime prevention. Budget constraints not only limit enforcement efforts but also affect private actors' assessment of how likely it is that wrongdoing will be detected, which may prompt them to risk more wrongful conduct.

Private enforcers, on the other hand, have the potential to be very effective supplements or substitutes for public enforcement, when not constrained by such limitations as those restricting private recovery, as in PSLRA.<sup>59</sup> Private actors sometimes have substantial information about offenders' wrongdoing. Whether private actions work well as alternatives to criminal enforcement depends in part on the nature of wrongdoing and harm. (I hold aside issues of frivolous litigation.)

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<sup>56</sup> On the longstanding debate and enforcement funding levels for regulation generally, see Robert A. Kagan, *Regulatory Enforcement*, in HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW 383, 383–84 (David H. Rosenbloom & Richard D. Schwartz eds., 1994).

<sup>57</sup> Cf. Koniak, *supra* note 33, at 1247–48 (discussing attorney lobbying of SEC to weaken rules that create liability if attorneys fail to meet new reporting duties).

<sup>58</sup> See GENERAL ACCOUNTING OFFICE, PRELIMINARY OBSERVATIONS ON THE SEC'S SPENDING AND STRATEGIC PLANNING EFFORTS (July 2003), available at <http://www.gao.gov/highlights/d03969high.pdf> (noting that the SEC's workload grew much faster than its budget beginning the mid-1990s, and that it received the largest budget increase in its history in 2003); Cox & Thomas, *supra* note 55, at 13 (discussing effects on review and enforcement of under-funding SEC staff through the 1990s). Congress also limited IRS monitoring and enforcement ability through a collection of procedural changes. See IRS Restructuring and Reform Act, Pub. L. No. 105-206, §§ 1001–9016, 112 Stat. 685, 26 U.S.C. § 1 (2000). Cf. Cox & Thomas, *supra* note 55, at 18 (finding that SEC enforcement actions target smaller companies than private litigation.).

A related point is that plausible increases in agency budgets might not solve such problems because large-scale disclosure requirements create "information overload," generating unmanageable amounts of data and prompting poor strategies for processing them. See, e.g., Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417 (2003) (making this point in securities context with regard to public and private monitors). Money laundering statutes require reporting of large financial transactions as a way for the government to monitor large-scale criminal conduct, but a recent study by Mariano-Florentino Cuellar finds that information disclosure yields the government little in terms of important investigatory leads and discovery of new crimes. Instead, money laundering often functions as a basis to more harshly sentence offenders convicted of other crimes as well. See Mariano-Florentino Cuellar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 417 (2003).

<sup>59</sup> See La Porta, De Silanes & Shleifer, *supra* note 55 (discussing the efficacy of private enforcers). The problem is that private enforcers also have the ability to be costly, inefficient plaintiffs, which was one reason for the limits imposed by the PSLRA.

Private action ought to work especially well when victims (a) have information about the identity of a wrongdoer and the extent of the harm, and (b) have the resources and ability to execute an enforcement action privately.

Consider the various and somewhat contrasting ways these enforcement dynamics interact and play out for wrongdoing in different contexts. In some contexts, such as securities regulation and fraud in government contracting, private rights of action exist (even post-PSLRA) that allow private suits to supplement public enforcement efforts. Note the information dynamics in typical securities fraud cases. Investors may have little information about the nature of the fraud if offenders avoided disclosure requirements or those requirements were inadequate to reveal the fraud. But the identity of offenders is easy to learn; investors know the firms in which they own stock. The amount of loss can be substantial, making private suits cost effective. Even when individual losses are small, victims with small losses can be aggregated into a class, gaining economies of scale that make actions cost effective. The hard part in this context is uncovering the nature of the fraud.

Contrast securities fraud with environmental wrongdoing. Some harms are hard to spot, as when contamination is invisible; victims may not even know an injury has occurred. Other harms are easily visible but their source—the violator's identity—is hard to learn. When the harm and the offender are identifiable, information gathering on the violation necessary for litigation can be costly and burdensome.<sup>60</sup> Further, the harm may be diffuse across a large number of victims. To take on the role of enforcers, victims must be organized into groups, often by activist lawyers and environmental groups.

By way of comparison, consider prototypical street crimes. In vice crimes—drugs most importantly, but also prostitution and other consensual “morals” crimes—there is typically no victim interested in enforcement. In other crimes—thefts, burglaries, some (but not all) assaults and homicides—victims can't easily (or at all) learn an offender's identity. If identity is known, a private action is not practical in the large set of cases in which losses are relatively small in monetary terms compared to litigation costs, and victims are isolated, so that they can't aggregate into plaintiff classes. Moreover, civil alternatives to prosecution in these contexts are limited because so few offenders have financial means to pay damages. Thus, victim access to offense information varies across types of offenses, as does victims' ability to feasibly bring private actions. For those reasons alone, we would expect to see criminal law (or other forms of public enforcement) used more often against some forms of wrongdoing than others. On top of those variables, private actions do not fully compensate and cannot fully substitute for public prosecution for other reasons. In some contexts, Congress and courts have limited the scope and effectiveness of private actions (such as in

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<sup>60</sup> A worst-case scenario of information gathering, which was crucial to linking a violator's actions to subsequent harm, was recounted in JONATHAN HARR, *A CIVIL ACTION* (1995).

securities regulation),<sup>61</sup> even when private parties could otherwise serve as zealous private enforcers. Further, some potential plaintiffs opt not to bring viable claims such as *qui tam* actions for personal reasons such as loyalty to (or fear of) the offender-firms that employ them.

Finally, note that the foregoing description includes no mention of political dynamics. Civil actions can substitute for criminal enforcement when goals are utilitarian ones of deterrence, incapacitation and restitution. But they are much less effective at fulfilling criminal law's retributive role of imposing just deserts or (some) expressive roles of public condemnation.<sup>62</sup>

More importantly, whether civil or criminal mechanisms are more effective in a given context is hardly the only determinant of the mix of enforcement tools we see in practice. Political and cultural factors are important elements in the shape of regulatory regimes, at the stages of both design and ongoing implementation. I turn now to some of those considerations.

## II. TAKING STOCK OF REGULATION AND SANCTIONING POLICY OPTIONS

Even when the practical hurdles of information gathering in the face of privacy and complexity barriers and limited enforcement budgets are overcome, part of the challenge of assessing the efficacy of corporate criminal enforcement is the continuing lack of clarity about the most effective strategies for deterrence and the appropriate conceptions of retribution. Before being able to fully assess and respond to the practical concerns of corporate criminal responsibility, it makes sense to take stock of different conceptual visions of how corporate liability should be approached.

A range of scholars have explored the difficult question of the appropriate mix for the wide range of available sanctions in corporate crime. Doctrinally, at least, we have both criminal and civil enterprise liability as an option for firms whenever an agent on the job commits a crime on behalf of the firm. Scholars have argued for a range of narrower approaches to corporate liability that build on conceptions of corporate intentionality or "ethos" to ground liability more

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<sup>61</sup> See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995). For a critical discussion of the PSLRA, see Lynn A. Stout, *Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711 (1996).

<sup>62</sup> The literature on the expressive function of law has grown increasingly rich in recent years. The leading contributor in criminal law scholarship is Richard McAdams, who has described varying expressive functions of law. Here I will note only that some of those expressive functions—including revelation of risk information, resolving "focal point" or coordination problems, and signaling social norms conventions—can be fulfilled by civil enforcement regimes as well as criminal. See Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000) (describing law's ability to inform people of dominant social norms); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000) (describing focal point theory and coordination problems); Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law* (2001), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=260996](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=260996).

thoroughly in traditional criminal principles.<sup>63</sup> The Justice Department as a matter of policy adopts more restrictive grounds than enterprise liability for corporate prosecutions.<sup>64</sup> Additionally, criminal liability is evaluated in light of a range of civil liability and regulatory sanctions that are typically available as alternatives or supplements. (These alternatives are grounds on which the Justice Department will decline to pursue criminal prosecution.<sup>65</sup>) Further, firm liability is an enforcement strategy that typically works in conjunction with individual criminal and civil liability for officers and employees.

The point of this paper is not to attempt an analysis of the appropriate mixture of civil, criminal, corporate and individual liability options for a broad range of wrongdoing in corporate settings. There are several well-known efforts at that project, and I will simply reference some of them here. Nearly two decades ago, Reinier Kraakman offered a sophisticated analysis of the appropriate conditions for corporate and individual liability.<sup>66</sup> He advocated broad use of enterprise liability for firms as a crime prevention strategy and identified the conditions under which individual, rather than corporate, liability is likely necessary. Those conditions include instances when firms lack assets sufficient to pay penalties, when the law cannot impose sufficiently high sanctions to deter firms' illegal conduct, and when the government lacks the enforcement capability to impose sufficient penalties for wrongdoing.<sup>67</sup> In the latter instances, Kraakman urged the now-common strategy (recently beefed up with the Sarbanes-Oxley Act) of imposing liability on others—accountants, lawyers, bankers—who can monitor and influence the firm.<sup>68</sup>

More recently, Jennifer Arlen has argued that corporate criminal liability can create perverse incentives that lead to less detection of lawbreaking and a less efficient enforcement regime.<sup>69</sup> Because corporate crimes are often hard for the government to detect, enforcement officials depend on firms for assistance in detection. Yet if firms realize that finding and revealing such crimes will result in firm liability, they will invest less in detection efforts. When the crimes cost the

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<sup>63</sup> See Bucy, *supra* note 9, at 1099–1101 (discussing conceptions of corporate ethos and responding to the literature on intentionality theories and related points).

<sup>64</sup> See Thompson memo, *supra* note 23 (summarizing doctrinal bases for corporate liability and outlining factors that restrict decisions to prosecute despite the doctrine's broad scope).

<sup>65</sup> See *id.*

<sup>66</sup> See Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984).

<sup>67</sup> See *id.* at 867–68.

<sup>68</sup> See *id.* at 868, 891. For an earlier, similarly elaborate analysis of the appropriate mix of corporate and individual liability (and interventionist versus noninterventionist approaches controlling firm behavior), see Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980).

<sup>69</sup> See Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994).

firm money, they may invest in detection anyway,<sup>70</sup> as long as the cost of detection and resulting liability are less than the cost the firm suffers from agent crime. But when those investments increase the prospects of government detection and corporate liability, firms may in fact invest less in detection so as to minimize corporate liability.<sup>71</sup> Like Kraakman, Arlen proposes that enforcers select from other liability options according to the context of corporate wrongdoing. She urges a negligence rule when the risk of firm insolvency is great; a privilege rule, by which the government would not use against firms any evidence they voluntarily disclose, when administrative costs to the government of determining a firm's compliance efforts are high; and a mitigation rule when neither insolvency nor administrative costs are serious concerns.<sup>72</sup> Note that the current regime of leniency in exchange for cooperation and for maintaining corporate compliance programs work much like Arlen's proposed privilege rule. They are a basis for (though not a blanket guarantee of) leniency, and they thereby create an incentive for investment in detection; they discount the penalty the firm itself could incur from revealing agents' criminal conduct.<sup>73</sup>

John Braithwaite and others have offered an approach of gradually escalating enforcement mechanisms—that start with warnings and compliance agreements, proceed through civil sanctions, and reserve increasingly severe criminal sanctions for recalcitrant offenders. Braithwaite's approach is focused on the dynamic interaction between firms and enforcers, and it strives for monitored, voluntary compliance by firms and negotiated, rather than commanded, resolutions.<sup>74</sup>

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<sup>70</sup> Note a point that Arlen does not discuss: it is also possible the firm benefits directly or indirectly from agent crime; that also discourages investment in crime detection (and perhaps increases investment in efforts to hide criminal activity).

<sup>71</sup> See Arlen, *supra* note 69, at 835–37.

<sup>72</sup> See *id.* at 862–66.

<sup>73</sup> Vikramaditya Khanna has also analyzed corporate liability in comparison to its alternatives on purely instrumental terms, though his focus was substantially different from Arlen's. Khanna concluded that corporate criminal liability rarely serves any purpose that cannot also be fulfilled by corporate civil liability, because criminal law's key advantages are either illusory—such as the greater discovery powers of grand juries, which are now largely matched by the civil investigative demand—or unnecessary for corporate defendants—such as the high standard of proof to prevent false convictions. See Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477 (1996).

<sup>74</sup> See BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 133–57 (1993); IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 101 (1992); John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 MICH. L. REV. 1466 (1982).

Kenneth Mann has developed a somewhat comparable proposal for distinguishing between the roles of civil remedial mechanisms, punitive civil sanctions, and criminal sanctions. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795 (1992). Though less detailed than Braithwaite's vision, Mann urges that prosecutors take over punitive civil enforcement tasks from administrative agencies and use punitive civil enforcement to replace expansive applications of criminal sanctions, which he would reserve for the most egregious conduct. Mann's proposal does not focus on corporate and white-collar crime, though the sanctions

Despite their differences, a common theme of these academic accounts is to accord a large role to non-criminal sanctions and remedies. We find this commitment as well in government policy. While Congress has expanded the prospects for criminal liability (albeit mostly for individuals in corporate settings) and the severity of sanctions (for both individuals and firms), the Justice Department has explicitly restrained its powers of enforcement, and adopted guidelines that encourage imposition of corporate criminal liability only after taking account of the effects of civil and administrative sanctions' sufficiency, other prosecutions (typically against individuals, whether by federal or state prosecutors), the firm's compliance efforts, and the ancillary effects on third parties.<sup>75</sup> Notably, the current version of corporate prosecution guidelines, adopted by the Bush administration in 2003 and which largely tracks Clinton administration policy, includes a preference for federal prosecutors to seek settlement of corporate crime cases through pre-trial diversion—a process traditionally used only for minor crimes<sup>76</sup>—in exchange for the firm's cooperation with prosecutors.<sup>77</sup>

The point for present purposes is that corporate or white-collar crime presents a much broader range of established sanction and remedy options than is the case for traditional street crime. While there is no consensus on the optimal mix of those enforcement options, there is a widely shared view that criminal punishment should not be the sole or even primary enforcement tool even for wrongdoing clearly defined in criminal statutes and that fits traditional criminal law criteria of intentional action and substantial harm.

The challenge to implementing that view is the populist influence on criminal justice enforcement. Criminal law is unusual if not unique in government policymaking in that its key administrators, prosecutors, are popularly elected (or, in the federal context, are political appointees), and yet there are no significant structural checks on the risks of majoritarian rule. This contrasts, of course, with the structure of federal and state governments generally; the Constitution sought to limit pure majoritarian rule with a collection of structural features including separation of judicial, executive and legislative powers and a bicameral legislature. Those structures, along with judicial review, reflect a distrust of populism and direct democracy. But those limits are largely absent in criminal law enforcement. Prosecutors are elected, but courts exercise no real supervision of enforcement

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he addresses are frequently employed in that context. And in contrast to Khanna's view that firms need criminal procedure's protections less than individual offenders, Mann is interested in ensuring that procedural protections increase, regardless of the offenders' status or means, as responses increase from remedial awards, through civil penalties, to criminal sanctions.

<sup>75</sup> See Thompson memo, *supra* note 23.

<sup>76</sup> See U.S. ATTORNEYS MANUAL § 9-22.010, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/) (one purpose of the pretrial diversion is "[t]o save prosecutive and judicial resources for concentration on major cases," and in diversion dispositions "[t]he period of supervision is not to exceed 18 months," a limit that suggests use for lesser crimes).

<sup>77</sup> See Thompson memo, *supra* note 23, at VI.B.



policy. There is similarly no significant check on legislatures' definition of crimes and punishments, which has yielded the much-discussed expansion of substantive criminal law, longer incarceration sentences, and constraints on judicial power over sentencing.<sup>78</sup> Even as some states have begun to moderate mandatory sentencing policies,<sup>79</sup> Congress has continued to expand criminal sanctions and bases for liability for corporate wrongdoing,<sup>80</sup> and has limited judicial power to moderate sentencing in other contexts.<sup>81</sup> The challenge is to maintain a democratically responsive enforcement structure that is amenable to a mix of civil and criminal sanctions in the face of popular pressure that tilts in favor of criminal prosecution.

### III. ENFORCEMENT CHOICES IN LIGHT OF PRACTICAL CHALLENGES AND DRAWING INSIGHTS FOR STREET CRIME ENFORCEMENT

The key to an enforcement structure that can take advantage of alternatives to criminal law in the face of popular pressure for harsh enforcement lies in the enforcement dynamics outlined above. Cooperation deals are pervasive because they solve challenges to government information-gathering and challenges from budget limitations. In the process, they mediate levels and forms of criminal sanctions. Large firms have greater ability than other sorts of parties to manage cooperation in ways that make possible their preferred package of sanctions.<sup>82</sup> Cooperation by firms influences liability decisions for a broader array of potential defendants—the firm, its corporate subsidiaries, top officers and mid-level employees. It does so across a broader array of penalties or other governmental responses than is true for individuals in non-corporate settings. High profile criminal cases suggest that the government is not unfairly matched against even the biggest firms in litigation resources, but it faces opponents who have ample ability to take advantage of investigation barriers and multiple disposition options to make persuasive cases for preferred modes of liability. Further, the government

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<sup>78</sup> For an extensive, recent argument on the politics of criminal law making and enforcement, albeit one that focuses on traditional street crime, see Stuntz, *supra* note 1.

<sup>79</sup> See Vera Institute of Justice, *Corrections Policy and Budget Actions in the States* (2003) (summarizing state legislative reform of sentencing and corrections policies, including repeal of mandatory sentences); Paul von Zielbauer, *The American Agenda for Fighting Crime: More Prison Time . . . and Less*, N.Y. TIMES, Sept. 28, 2003, at A25 (noting such legislation in California, Indiana, Kansas, Michigan, North Carolina, and Texas and contrasting it with federal policies seeking greater incarceration).

<sup>80</sup> See Sarbanes-Oxley Act, *supra* note 33.

<sup>81</sup> See Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, 117 Stat. 650, § 401(a), (b) (2003) (limiting downward departures under the U.S. Sentencing Guidelines for several crimes involving minors, sexual abuse or pornography and raising penalties for some crimes). For a collection of materials on the Feeney Amendment, see <http://www.nacdl.org/departures>.

<sup>82</sup> See Laufer, *supra* note 8; Khanna, *supra* note 51, at 54–61.

probably is overmatched with respect to regulatory enforcement in light of limited budgets, which reduce both rates of detection for wrongdoing and, more speculatively, the severity of settlements.

Parties with resources are inevitably going to be able to use these dynamics to their advantage and fashion strong arguments for some enforcement options over others. Firms with information control are likely sometimes to be able to “push liability downward” to mid-level employees who responded to corporate incentives rather than acted as pure renegades.<sup>83</sup>

But the upshot of large firms’ ability to exert greater influence on the punishment of their wrongdoing than small firms or individuals has possible benefits, especially when set against the backdrop of modern criminal law enforcement dynamics. Even with corporations’ ability to moderate white-collar crime prosecution, the United States uses criminal law more than other advanced democracies to address corporate wrongdoing. Offenders’ ability to push dispositions away from the harshest forms of criminal liability moderates populist political pressure to employ criminal law, when other dispositions are effective for both instrumental goals and (to some degree) goals of expressive condemnation and just deserts.

In the common practice of sophisticated federal criminal litigation,<sup>84</sup> firms may be able to make persuasive cases that prosecution would have excessive ancillary costs for innocent parties. Harsh criminal (or even civil) punishment of the firm may hurt its low-level employees, pension holders, communities that depend on the firm’s employment, others in the firm’s contractual network such as suppliers, and shareholders (who might be depicted as innocent parties due to their lack of control, though they own the firm that committed wrongdoing from which they may have benefited). Many of these collateral consequences are explicit bases for declination or leniency under the Justice Department’s Principles of Federal Prosecution for Business Organizations.<sup>85</sup> All criminal law enforcement creates some of these ancillary costs. Sophisticated parties such as large firms can more persuasively make the case that these costs are grounds for alternative forms of disposition, such as combinations of civil remedies and individual agent liability. They can define and emphasize the scope and nature of ancillary harms that otherwise may be unnoticed or undervalued. Through sophisticated representation, firms may be influencing the government not toward an *unfairly*

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<sup>83</sup> This is William Laufer’s phrase. See Laufer, *supra* note 47, at 1348, 1385.

<sup>84</sup> For a description of pre-charging negotiation between federal prosecutors and investigative targets, see Gerard Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2129–36 (1998); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 778–79 (1999).

<sup>85</sup> See Thompson Memo, *supra* note 23. I have explored this point in more detail. See Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383 (2002).

lenient deal but a better overall social policy on wrongdoing—one with lower ancillary costs to innocent third parties, for example.<sup>86</sup>

Expansive criminal liability at the legislative level is reduced at the enforcement level when integrated with the range of civil and regulatory options. And that broad range of remedial options is a positive development, despite the opportunity it creates for manipulation. When juxtaposed to the more limited set of policies addressing street crime, or even wrongdoing by small firms, it looks especially good. We need more tools across the range of criminal law that allow civil or remedial alternatives or supplements to criminal law. Greater options would allow us to reduce the form and severity of sanctions at least when punishment aims primarily to achieve instrumental remedial and prevention goals.

That last point, of course, depends on a normative preference for less punitive criminal punishment rather than more whenever the instrumental goals of criminal law can be achieved without them. William Laufer and Alan Strudler condemn firms' influence in enforcement policy because of a strong deontological commitment to retributivism; they want firms criminally punished in order to condemn moral fault, regardless of the efficacy of such sanctions for other, instrumental purposes.<sup>87</sup> But commitment to that view comes at considerable cost. Criminal sanctions, especially harsher punishments that exceed those needed for remedial and prevention goals, impose ancillary consequences on a range of parties, from the families of street crime offenders to employees and contracting partners of large firms. There are good arguments for reducing those consequences when other forms of sanctions can achieve most goals save for a strong commitment to retribution.

The upside of firms' strength in the enforcement process is their ability to push for such dispositions, which in turn works as a counterweight to populist political pressure for harsh sanctions. In lieu of structural checks on majoritarian enforcement policy, we have the imperfect effective power of interest groups—offenders and their allies who have means to influence and moderate enforcement decisions.

On this view, the greater challenge is to find a way to create that sort of balance, and thereby a broader range of disposition options for street crime. We have some models for that practice now in specific sectors of traditional crime. Drug courts and other “problem-solving” courts, as well as diversion programs, create alternatives to criminal sanctions for non-violent offenders such as drug

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<sup>86</sup> It bears emphasis that there is no guarantee that firms will pursue their self-interest in ways that optimally moderate third-party and social costs rather than illicitly “pushing liability downward” on mid-level scapegoats. But for reasons discussed above, assessing claims of *inappropriate* liability on mid-level agents is difficult, and there is a greater prospect of outcomes that are, if not optimal, at least more balanced than is often the case in street crime contexts due to firms' litigation ability.

<sup>87</sup> See Laufer & Strudler, *supra* note 45, at 1286–87 (arguing for a position “less concerned with creating optimal liability” and giving priority to “principles of desert” that “trump considerations of efficiency or desirability”).

treatment and related social services.<sup>88</sup> While courts and prosecutors are often proactive in identifying offenders for drug court and diversion programs, expansion of non-criminal dispositions likely depends on giving this class of offenders the means to negotiate for them. The well-documented underfunding of indigent defender services, then, as well as fewer existing options for non-criminal dispositions, distinguish the prospects for the street crime sector.

This raises the other normative basis for criticism of corporate enforcement policy—a distributive justice concern. Even if firms achieve dispositions for their wrongdoing that are otherwise normatively defensible, it remains troublesome that other parties—perhaps mid-level firm employees who incur criminal liability, or a broad range of offenders outside the white collar crime context—do not.<sup>89</sup>

This is probably the most troublesome implication of the dynamics of corporate crime enforcement. Parties with the leverage of information control, and parties with ample litigation resources, are always going to be in much better positions than parties that lack those advantages.

#### IV. CONCLUSION

The traditional concerns of criminal law enforcement policy are those of excessive government power. Most of constitutional criminal procedure doctrine is about limiting government power due to fears of invasive searches, coerced confessions, juryless trials, and unrevealed exculpatory evidence. A key entitlement designed to counterbalance many of those risks are rights to counsel. But white-collar corporate offenders largely have ample access to counsel and a range of means to resist government enforcement strategies. Those dynamics create a very different enforcement regime. While it creates risks of injustice in the form of defendants who are able to hide wrongdoing or negotiate lighter sanctions than they deserve, it has advantages as well. Some of what distinguishes white-collar enforcement from street-crime policy is offenders' ability to remedy injuries with money (a function of both offender wealth and the nature of harms).

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<sup>88</sup> See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PROGRAM BRIEF: STRATEGIES FOR COURT COLLABORATION WITH SERVICE COMMUNITIES 2 (2002) (describing such courts in California, Florida, New York, Michigan, Kentucky, Washington, and South Carolina); see also John Feinblatt & Greg Berman, *Responding to the Community: Principles for Planning and Creating a Community Court* 4 (BJA Bulletin, NCJ-185986, Feb. 2001). For a broader survey of community-level innovations in crime fighting, see BUREAU OF JUSTICE ASSISTANCE, COMPREHENSIVE COMMUNITIES PROGRAM: PROMISING APPROACHES (NCJ-184956, Apr. 2001). Such programs are overwhelming for low-level offenders; less than 5-percent of felony arrestees in large urban counties participated in diversion programs. BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1998 (Nov. 2001) (giving 1998 figures).

<sup>89</sup> But if this is the case, the remedy is not necessarily more severe criminal sanctions on firms (with attendant greater social costs), but a means to moderate criminal punishment for other offenders in light of collateral consequences and dispositional alternatives.

But much of that distinction arises also from the rough resource parity between enforcers and offenders. It is hard to evaluate carefully concerns that firms fool the government sufficiently to push unfairly liability away from themselves and top managers onto others. It is relatively easy to see that, although some sanctions are inevitable, large firms are able to shape the nature of sanctions more favorably than are the broad range of criminal defendants. The practical barriers to corporate crime enforcement have arguable, perhaps substantial, advantages in moderating the harshness of criminal law enforcement. The goal should be at least as much to find ways to moderate criminal enforcement outside of that realm—and thereby reduce appearances of distributive injustice—as it should be seek further ways to control wealthy parties' unfair manipulation of enforcement policy.

